No. 3933

United States
Circuit Court of Appeals
For the Ninth Circuit
SAN FRANCISCO, CALIF.

In the Matter of EARL N. McKINNEY, Bankrupt,
WILLIAM COWAN, Appellant and Petitioner,

vs.

JOHN P. CULL, Trustee, Appellee and Respondent.

Brief of Appellee and Respondent

Appeal and Petition for Revision from the United States District Court, Arizona District.

C. V. Manatt, of Douglas, Arizona, Attorney for Appellee and Respondent.

Filed this....., 1923

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Clerk of the Circuit Court of Appeals
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Service of three copies of the within brief of appellee acknowledged this.....day of

....., 1923.

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Attorney for Appellant and Petitioner.

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In the Matter of EARL N. McKINNEY, Bankrupt,
WILLIAM COWAN, Appellant and Petitioner,

vs.

JOHN P. CULL, Trustee in Bankruptcy, Appellee and Respondent.

BRIEF AND ARGUMENT OF APPELLEE.

Statement of Case.

A full and complete statement of the case we believe to be an aid to a full and complete understanding of the matters involved in and at issue in the foregoing cause.

For some years prior to November 1st, 1917, the bankrupt Earl N. McKinney was engaged in the Dairy business near Douglas, Arizona, and had accumulated considerable property both real and personal, variously estimated to be of the value of from $30,000.00 to $45,000.00, and had from time to time borrowed sums of money from the Appellant William Cowan, and at or about November 1st, 1917, owed said Cowan something over $19,000.00 including accrued interest as Cowan then claimed.

That about November 1st, 1917, arrangements were made between McKinney, bankrupt, and Cow-

an whereby the possession of all the property of the Bankrupt was turned over to Cowan under his mortgages, and the Dairy business was to be run by Cowan under the management of McKinney, until the business would liquidate the then indebtedness of McKinney's to Cowan, and then the property and business was to be turned back to McKinney Bankrupt free and clear of all liens and claims.

This arrangement went into effect November 2nd, 1917, and McKinney was employed as manager or other employee, which arrangement endured up to April 1st, 1918, when McKinney quit the arrangement for reasons which he sets out in his testimony.

That about the 1st of January, 1918, and during the time the business was being conducted under the oral arrangement as set out, Cowan began suit in the Superior Court of Cochise County, Arizona, to foreclose his various mortgages on the property of Bankrupt, claiming due the sum of $19,901.68, and on the 8th day of January, 1918, a tentative order was made by the Court granting judgment for that sum with $500.00 attorney's fees on the presentation of written judgment, which written judgment was not presented to the Court and signed until the 16th day of December, 1918.

That Cowan remained in possession of the property during all the time up to November 25th, 1919, and 28th day of November, 1919, when the property was sold to Cowan under order of sale and execution under the judgment above, personal property

November 25th for the sum of $15,736.55 and realty November 28th for the sum of $8,612.78 or the total of $24,349.34 being the full sum due Cowan on his judgment with 10% interest from January 8th, 1918.

That the accumulated interest on the judgment or the sum of $3,439.97 was collected by sale by Cowan, and since the 2nd day of November, 1917, Cowan had full and complete possession of all the property of the Bankrupt, and the use and profits derived therefrom, and at no time was any credit given to the estate of Bankrupt.

That the Trustee did bring suit for accounting, and after this suit was instituted and pending did start suit to enjoin the Sheriff from selling this property until an accounting was had, to which suits the Court promptly dissolved the temporary restraining order, and sustained demurrers to the two complaints, and the causes were dismissed without taking an appeal.

That the Trustee filed claim that Cowan owed the estate various sums of money which had been paid him by Bankrupt, and not credited and had held the property for over two years, used and run the same without having paid the estate for the use of same, and had during the time of his use computed and collected 10% interest on his mortgages against the same during all such time, and the Trustee asked that said Cowan and Bankrupt be cited to appear for examination, and the Bankrupt did appear and Cowan failed to do so, and on the evidence adduced the referee found that Cowan

owed the estate the sum of $5,038.41 which sum was made up from the sums of $1,265.54 as amount received at various times by Cowan and no credit given for same, the sum of $3,439.97 interest charged by Cowan and collected while he let his judgment stand without action, and the sum of $300.00 and some interest on an automobile deal sued on and no money advanced.

On this finding of the Referee in Bankruptcy a Citation was issued to Cowan to show cause why he should not pay to the Trustee for the Bankrupt estate the sum of $5,038.41, and on this order to show cause Cowan filed his objections to Jurisdiction, as well as to the merits and asked for relief, and after a hearing before the referee, Cowan, testifying, the Referee allowed Cowan a reduction of the amount of the sum claimed due from him in the sum of $300.00 and some interest claimed due the estate from the automobile deal, and finally ordered Cowan to pay to trustee the sum of $4,705.55 instead of the sum of $5,038.97.

That on this finding and order so made on Cowan, he prosecuted his petition for review, to the District Court of the United States for the District of Arizona, and after hearing the Court Judge Sawtelle sitting, confirmed and approved the findings of the Referee, and ordered judgment on the same against Cowan, and from which order and judgment this proceeding is prosecuted in this Court.

ARGUMENT.

In taking up the argument of the questions involved, we shall not strictly follow the order set out by the Appellant, as some and much of the time used by him in his brief, and argument is devoted to questions that are not vital, or of decisive importance in our opinion for a right determination of the cause.

The vital question here presented, is was the proceeding had by the Referee in Bankruptcy a Summary proceeding, legal and proper?

If the Court should determine this question in favor of Appellee and as determined by the Referee and District Court, then there can be no question of jurisdiction, nor the waiver thereof, for if this proceeding had before the Referee, was legal and proper he had full and complete jurisdiction to determine the matter, and whatever orders or judgment was found and entered, and as approved and confirmed by the District Court, under petition for review, such judgment or orders are conclusive, unless properly appealed from, which was not done by Appellant, as the record discloses, that the matter went from the Referee in Bankruptcy on petition for review only.

Our first consideration then is, under the facts as here presented was a Plenary suit necessary to be instituted by the Trustee against William Cowan to collect the sums due the estate.

To necessitate the institution of a Plenary suit there must be property rights to be settled and at

issue or the right of possession of property all in legal dispute.

There was nothing of this kind involved in the case at bar but the whole transaction was a matter of computation, and a matter that could be arrived at summarily.

The first item in which the Trustee claimed due from Cowan was the matter of how much the Bankrupt had paid Cowan from sales of mortgaged cattle and what amount Cowan had credited him with from those transactions.

The evidence of the Bankrupt and Cowan was taken on this matter and both agreed that the Bankrupt had paid Cowan something over $2,400.00 and Cowan could show that he had credited the Bankrupt with something over $1,100.00 of this amount, and found that the estate of the Bankrupt was entitled to the sum of $1,265.58 or the sum that Cowan had failed to give credit for.

In this inquiry, every opportunity was given Cowan, no legal right was he deprived of, as he was given credit for every cent he could show he was entitled.

It would do violence to justice, to hold that on such transactions a plenary suit should be instituted which would delay and be expensive.

The other item of $3,439.97 found by the Referee due the estate of the Bankrupt or Trustee from Cowan arose in this wise.

Cowan had taken over all the property of the Bankrupt on November 2nd, 1917, under the arrangement that he would run the business until

the business had made his indebtedness due him from the Bankrupt.

Cowan under such arrangement retained the possession of and operated the Bankrupt Dairy business and used and controlled all this property estimated to be of the value of from $30,000.00 to $45,000.00 and while this arrangement was being operated and in full force Cowan started his suit in the Superior Court of Cochise County, Arizona, to foreclose his several mortgages against the Bankrupt, and on the 8th day of January, 1918, under confession of judgment order for judgment was entered by the Court.

Cowan permitted this matter to rest for nearly a year before he caused formal entry of judgment to be made.

That after judgment entered he allowed his judgment to remain dormant until November 25th and 28th, 1919, when he bid in all the property for the sum of $24,349.34 which sum and amount was the amount of the judgment of January 8th, 1918, with Ten per cent interest from that date, the item of interest being the sum of $3,439.97.

The Referee found that this sum of interest was a surplus over and above the amount really due Cowan on his mortgage, and should be turned over to the Trustee as a part of the Bankrupt's estate.

To let Cowan keep this as interest and charge him with the value and profits of the use of the property, would entail much litigation, long delay with uncertain results, as the Trustee had no records or other items on which to maintain suit with

success, and such conclusion is just, fair and equitable, as Cowan in good conscience could not expect to use and possess all the property and get the profits and benefits therefrom for nearly two years and at the same time claim and collect his 10% interest.

If this property when sold had brought the sum of $30,000.00 instead of the sum of $24,349.34 the item of surplus of something over $5,000.00 would be due and payable to the Trustee without question, and the Referee in his findings and adjustment between Cowan and the Estate found that the property brought at judicial sale $3,439.97 more than Cowan had a right to and properly ordered him to pay same over to the Trustee for the benefit of the Bankrupt estate, all a matter of equity and computation.

This we think fairly presents the matters to this Court, and fairly presents the legal phase at least from our standpoint and all being a mere matter of justice, right and equity, and no property rights that can be legally in dispute or issue, the proceedings had were proper and right, with full jurisdiction in the Bankruptcy Court to determine all matter presented.

We are met at the outset with many Court constructions of the Bankrupt Act in which Courts have considered the Bankrupt side of the District Courts and its Referee little better than Courts not of record. However, by amendment, especially the Amendment of 1903 has given to the Jurisdiction of the Bankruptcy side of the District Court

a more general jurisdiction, and later Decisions of the Courts are much more liberal in htis respect, as they begin to recognize the absolute necessity of the Bankruptcy Court being recognized as something more than a mere name and having something more than clerical duties to be performed by the Referee.

See:

In Re Knopf 16 Am. B. R. 432, 144 Fed. 245.

Mueller vs. Nugent, 184 U. S. 1, 7 Am. B. R. 224.

Knapp vs. Spencer, 20 Am. B. R. 355.

Operators Piano Co. vs. First Wis. Trust Co., 283 Fed. 904.

Murphy vs. Hoffman, 211 U. S. 568, 53 L. Ed. 327.

Franzen vs. C. M. & St. P. (C. C. A.) 278 Fed. 370.

In re Dunaway, 275 Fed. 591.

II.

Our contention is further that if any Jurisdictional question arises in favor of the Appellant, the same was by him waived, and his acts and relief asked for and given in law is in effect a consent to this jurisdiction.

In taking up this feature of the brief we in no wise desire to be understood as in any measure abandoning our position that this is properly a summary proceeding as no title or property rights were involved.

The facts on which we base our position were as follows:

On the citation to Appellant to show cause why he should not pay the Trustee the sum of $5,038.41, Appellant came in and filed what he now denominates plea to jurisdiction. (Abs. 62-65).

If we interpret this plea correctly, it is a plea to the merits as well as jurisdiction, and at least on such plea Appellant testified and was heard on the merits and after the hearing, was given affirmative relief, in this, to-wit: the item of $300.00 and interest on the automobile was cut out of the amount of the Referee's findings solely on the showing made by Appellant. (Ab. 67).

There are many adjudicated cases which hold that after objection to jurisdiction, the objector may participate in the proceedings in an immaterial manner and not subject himself to the jurisdiction objected to, but there are no cases which hold that a party may object to the jurisdiction and at the same time plead to the merits and appear, and by his exclusive testimony obtain from that jurisdiction affirmative relief as in the case at bar, and still effectively rely on his objection to jurisdiction.

Sheppard vs. Lincoln, 25 Am. B. R. 804. 184 Fed. 182.

Ryttenburg vs. Schaferll, Am. B. R. 652. 131 Fed. 313.

III.

The Appellant spends much time, energy and space on the two cases that was instituted at one time in our Superior Court, but as the record discloses no results were realized from these cases and

because we saw the error of our ways, and changed the procedure and efforts in the Bankruptcy Court does not establish any legal matter favorable to Appellant.

These cases were started and afterward dismissed, and if any attempt was made to appeal same, it was unknown to the writer of this brief but no matter what the record may show as to this feature or any other feature of that abortive litigation, I cannot see how it can affect the rights of the parties to this proceeding here being considered, or in any way assist this Court in the determination of the issues here presented.

IV.

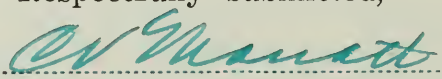
Appellant has taken some space to argue the facts, we assume the purpose of this part of the brief is to show the conclusions of the Referee, and the District Court, is not sustained by the evidence.

We are not inclined to discuss this matter in this Court, as the Court is well aware, there was preserved only an abstract of the testimony heard by the Referee which appears in our abstract of record and under these circumstances the findings of the Referee and Court are conclusive unless the testimony in full had been preserved, which is not true here.

In Conclusion we desire to state, that actual justice having been meted out between contesting parties, and because the conclusions of the Referee, as confirmed and approved by the District Court, are right, submit that the judgment of the lower

Court should be affirmed in all things, and that such judgment be recovered with 6% interest from the date of the findings of the Referee.

Respectfully submitted,



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